Supreme Court of the United States

GRACE LINE INC.,
Petitioner,

—*against*—

CUBA DISTILLING COMPANY, INC., and
DEFENSE SUPPLIES CORPORATION,
Respondents.

October Term, 1944.
No. .....

BRIEF OF PETITIONER, GRACE LINE INC., IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI.

FIRST POINT.

THE CIRCUIT COURT DECISION INTERPRETS THE "ERROR *in extremis*" DOCTRINE ERRONEOUSLY AND IN CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OF CIRCUIT COURTS FOR OTHER CIRCUITS.

The collision is described in the petition submitted herewith. *Petition*, pp. 2-3.

Despite the holding of the Circuit Court that the situation fell within the "error *in extremis*" doctrine, the Court concluded concerning the *Lara's* navigation that it could not "excuse her altogether", "whatever measure of lenity we should accord the *Lara*, faced with the sudden apparition of the *Cassimir.*" R. 320. Its opinion plainly shows

that the Court recognized the peril of the vessels and that their initial swift rudder actions were the primary causal factors in the collision.

However, the Circuit Court affirmed that there was fault and liability on the *Lara's* part because it considered that the *Lara's* right rudder action amounted to the exercise of poor judgment.

The Court said:

> "It made the '*Lara's*' navigation the only course sure to bring her into collision. Had she kept on she would probably have gone under the '*Cassimir's*' stern; had she backed, she would almost certainly have done so; had she put her rudder hard left, that result would have become still more assured. It is indeed the instinctive response of a master in an emergency to put his rudder hard right; if both ships do so, the chances of collision are apt to be much reduced. But no emergency will excuse the absence of all clear thinking; after all, men, charged with the responsibilities of command, must not be wholly incapacitated for sound judgment when suddenly thrust into peril." * * * "The situation falls within what we said in *A. H. Bull SS. Company* v. *United States,* 34 Fed. (2d) 614, 616; 'Even *in extremis* * * * some discretion is demanded; the phrase means no more than that less judgment is required in an emergency than when there is time to consider; it does not exculpate all faults; it is no more than a palliative.'" R. 320-1.

In contrast, this Court, in considering legal responsibility with respect to acts committed *in extremis,* has said:

> "Whether they were wise it is not material to inquire. If unwise, they were errors and not faults. In such cases the law in its wisdom gives absolution." *The City of Paris,* 76 U. S. (9 Wall.) 634, 638-9.

This Honorable Court's definition of the doctrine finds similar expression in other decisions of this Court. *The Favorita,* 85 U. S. 598, 603; *The Falcon,* 86 U. S. 75, 78; *The Maggie J. Smith,* 123 U. S. 349, 355; *The Blue Jacket,* 144 U. S. 371, 391-2; *The Ludwig Holberg,* 157 U. S. 60, 70; *The Oregon,* 158 U. S. 186, 204.

This Court, in *The Favorita, supra,* stated, at page 603:

> "It is said if the *Manhassett* had advanced instead of stopping she would have cleared the steamship. This may or may not be true, but if true, she is not in fault for this error of judgment. It was a question whether to advance or to stop and back, and the emergency was so great that there was no time to deliberate upon the choice of modes of escape. In such a moment of sudden danger, caused by the misconduct of the *Favorita,* the law will not hold the pilot of the *Manhassett,* acting in good faith, guilty of a fault, if it should turn out after the event that he chose the wrong means to avoid the collision, unless his seamanship was clearly unskilful. And this we do not find to be the case. On the contrary, if there were error at all, it was such a mistake of judgment as would likely be committed by anyone in similar peril."

Whereas in the instant case the Circuit Court has departed from the doctrine, other Circuit Courts have conformed to the decisions of this Court:

Third Circuit: *United States* vs. *P. F. Martin, et al.,* 1941 A. M. C. 149, 154-155 (otherwise unreported);

Seventh Circuit: *Bigelow* v. *Nickerson,* 70 Fed. 113, 123;

Ninth Circuit: *Rideout* vs. *Charles Nelson Co.,* 55 F. (2d) 783, 786.

The interpretation in the instant case is in effect that a Court is to scrutinize critically the judgment exercised by a navigator faced with immediate danger and impose liability for an act of judgment which it considers one of poor judgment and excuse only an act of judgment which it considers one of good judgment, although either act is an erroneous one. Such acts, of course, do not exhibit any omission to exercise reasonable care, for the finding that they were done *in extremis* necessarily imports that there was no reasonable opportunity to reflect or to deliberate; yet one act of judgment may be absolved and the other fashioned into liability.

Thus, the doctrine as applied by the Circuit Court leaves a party open to respond in damages, not for negligence in its accepted sense but for a non-negligent act of judgment which is assessed as lacking sufficient wisdom or discretion on some indefinable basis. This conception applied to the instant case is the reiteration of the same conception as expressed and requoted by the Court in its earlier decision of *A. H. Bull SS. Company* vs. *United States*, 34 F. (2d) 614, 616.

Uncertainty in this Circuit Court as to the limits of the doctrine appears very clear for it has applied the doctrine in other cases in consonance with this Honorable Court's decisions.* Such vacillation and varying results of litigation in important marine matters to which identical principles are applicable are productive of unnecessary litigation. The principle involved is one to which frequent resort can be expected in the numerous collisions which have occurred under extraordinary wartime conditions of navigation.

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* *The Condor-The Nordpol*, 34 Fed. (2d) 3, 5; *The Coney Island-The Exporter*, 131 Fed. (2d) 904, 905.

SECOND POINT.

THE CIRCUIT COURT IN ERRONEOUSLY UNDERTAKING AN APPRAISAL OF AN ACT OF JUDGMENT *in extremis* ALSO ERRED IN ITS APPRAISAL.

The Court considered that the *Lara's* rudder action was an unsoundly judged act. Whether it was unsoundly judged or soundly judged is immaterial under the correct theory of the doctrine of error *in extremis*. Clearly, the true doctrine would charge as a fault only an act which was very plainly grossly inept or incompetent. That is not the case here. As shown by the Circuit Court's opinion, the act was one which the Court considered was the result of poor judgment.

As we have said, the Court has exhibited a well-defined course of departure from a principle which comes into play in collision cases, very probably with increasing frequency in the volume of wartime collisions. Moreover, the misapplication of this general principle in this particular case illustrates the readiness with which a Court may fall into error when trying to dissect the propriety of a judgment exercised *in extremis*.

The Court obviously judged the situation of danger confronting the *Lara* not from the position of her navigator on the bridge but from the deceptive height of the knowledge of after-events. It was poor judgment, so the Court concluded, for the *Lara* to direct her course to her right for "had she kept on, she would probably have gone under the *Cassimir's* stern; had she backed, she would almost certainly have done so; had she put her rudder hard left, that result would have become still more assured." R. 320.

The *Lara* navigator had only the apparent bearing and heading of the *Cassimir* to guide him. The *Lara* at that

time did not know, and could not know, that the *Cassimir* had put her rudder hard left. The *Cassimir* bore ahead and her lights, white ranges and green side light, showed that she was heading slightly to the *Lara's* right hand side. From the vessels' relative positions the *Lara's* navigator assumed that the *Cassimir* would put her rudder to her right. R. 174-5. This was a correct assumption. If the *Cassimir* was "end on", the statutory rules of navigation* required the *Cassimir* to go to her right. If the *Cassimir* was on a crossing course, she would be the burdened vessel under the statutory rules of navigation** and required to go to her right.

The District Court has confirmed the correctness of this assumption in finding that the *Cassimir* should have put her rudder to her right. R. 300; *Conclusion VII.* The *Cassimir* did not challenge this conclusion and the Circuit Court has not disturbed this finding.

Should the *Lara* be charged with poor judgment, and with fault, for not assuming that the *Cassimir* would do the wrong thing? Only if the *Lara's* navigator assumed that the *Cassimir* would wrongfully put her rudder left, would the *Lara's* right rudder be "the only course sure to bring her into collision."

The Circuit Court, critical of the *Lara's* judgment in going to her right, conceived that it would have been better judgment if collision were to be avoided if the *Lara* had kept on; or backed; or put her rudder hard left. But these measures would have been the one sure way to produce collision if the *Cassimir* had done the right thing and gone to her right. The *Cassimir* instead put her rudder hard left and did the wrong thing. But the *Lara's* navigator

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* Art. 18, International Rules, 33 U. S. C., §103.

** Arts. 19, 22, 23, International Rules, 33 U. S. C., §§104, 107, 108.

had no knowledge of this error of the *Cassimir* at the time the *Lara* went to her right.

Obviously, the Circuit Court's conclusion that the *Lara's* right rudder action was not one of good judgment is based on the Court's acquired knowledge that when this action was taken the *Cassimir* had already mistakenly put her rudder hard left. On the correct premise that this fact was not known to the *Lara's* navigator when he acted, it is clear that the *Lara* acted correctly and with good judgment. So, the Circuit Court erred in its analysis and in so doing exhibited the companion error of misinterpretation of the error *in extremis* doctrine.

The error of law of the Circuit Court appears plain. It is submitted that it is apparent on the face of the Circuit Court's opinion that the Court's assessment of fault against the petitioner is reversible error and that the *Lara* should have been exonerated.

LAST POINT.

A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AS PRAYED FOR IN THE ANNEXED PETITION SHOULD BE GRANTED AND THE DECREE OF THAT COURT SHOULD BE REVERSED.

Respectfully submitted,

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EUGENE F. GILLIGAN,
Of Counsel.

New York, N. Y.,
October 24, 1944.